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No. 90-132

FILED
SEP 27 1990

In the Supreme Court of the United States

OCTOBER TERM, 1990

TONY STEVEN STONE AND
PATSY ANN DUNN HOLLIDAY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Sentencing Guidelines' requirement that the base offense level for offenses involving Dilaudid and Diazepam be calculated from the gross weight of the tablets containing the controlled substance, rather than from the net weight of the active ingredients, is consistent with the Controlled Substances Act.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A5) is unpublished, but the decision is noted at 900 F.2d 257 (Table).

JURISDICTION

The judgment of the court of appeals was entered on March 29, 1990. A petition for rehearing was denied on April 27, 1990. The petition for a writ of certiorari was filed on July 25, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following their guilty pleas in the United States District Court for the Middle District of North Carolina, petitioners were convicted on one count of conspiracy to possess Dilaudid and Diazepam with intent to distribute them, in violation of 21 U.S.C. 846. Petitioner Stone was sentenced to 27 months' imprisonment, to be followed by a five-year term of supervised release, and was fined $3,000. Petitioner Holliday was sentenced to 33 months' imprisonment, to be followed by a five-year term of supervised release, and was fined $10,000.

1. Between November 1985 and January 1988, petitioner Holliday, a pharmacist at a Veterans Administration hospital in Los Angeles, California, stole quantities of Dilaudid and Diazepam from the hospital and mailed the drugs to petitioner Stone for sale and distribution in North Carolina. The shipments ceased in January 1988, when federal officials seized two parcels containing 20,000 tablets of Diazepam and 231 tablets of Dilaudid.[1] Pet. App. A2.

Diazepam, better known as Valium, is a Schedule IV controlled substance. Diazepam tablets consist of a mixture of pure drug and inert ingredients. The Diazepam tablets seized by federal officials in this case had a gross weight of 170 milligrams each, and contained either 5 or 10 milligrams of active ingredient. The total quantity of Diazepam tablets seized weighed 3,400 grams and contained 135 grams of active ingredient. C.A. App. 39-41.

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[1] The statement by the court of appeals that there were 23 Dilaudid tablets is a typographical error. See Pet. 4; C.A. App. 31.

Dilaudid, a highly addictive painkiller, is a Schedule II controlled substance.[2] Like Diazepam, Dilaudid tablets contain inert substances and quantities of pure drug. The Dilaudid tablets seized by federal officials in this case had a gross weight of 20.426 grams and contained .56 grams of active ingredient. C.A. App. 31, 34.

2. Petitioners were sentenced pursuant to the Sentencing Guidelines. Sentencing Guideline § 2D1.1 instructs that "[c]onsistent with the provisions of the Anti-Drug Abuse Act, if any mixture of a compound contains any detectable amount of a controlled substance, the entire amount of the mixture or compound shall be considered in measuring the quantity" of the drug for purposes of calculating a base offense level. See Sentencing Guideline § 2D1.1(a)(3), at 2.39 n.* (Oct. 1987). The Guidelines provide for an escalating base offense level according to the weight of the drugs involved; a Drug Quantity Table contained in Guideline § 2D1.1 sets forth the applicable levels.

Consistent with the Guidelines, the district court calculated petitioners' base offense levels by considering the gross weight of the Dilaudid and Diazepam tablets, rather than by considering only the weight of active ingredients. After converting the total weight of the tablets to its heroin equivalent (see Application Note 10 of Guideline § 2D1.1, at 2.41), the court determined that the petitioners' base offense

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[2] Dilaudid is a narcotic belonging to the opium family. See 21 C.F.R. 1308.12, 1308.02(e)(1). The evidence in this case indicated that Dilaudid is called "pharmaceutical heroin" on the street, because it is very similar in chemical composition to "street heroin" and is highly abused. Gov't C.A. Br. 10.

level was 20.[3] Taking into account the remaining Guideline factors, the district court determined that petitioner Stone's Guideline range was 27 to 33 months' imprisonment, and that petitioner Holliday's Guideline range was 33 to 41 months' imprisonment.[4] The court then imposed the minimum Guideline sentence in each case.

The district court rejected petitioners' contention that only the pure drug contained in the tablets should have been considered in determining their base offense levels.[5] Petitioners acknowledged that for other controlled substances, the base offense level is calculated according to the total weight of the mixture containing a drug. In petitioners' view, however, only the weight of the pure drug should be considered

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[3] The offenses involved a total of 3,420.426 grams of Dilaudid and Diazepam, or the equivalent of 51.49 grams of heroin. Under the Sentencing Guidelines, offenses involving between 40 and 59 grams of heroin have a base offense level of 20.

[4] Stone's Guideline range was based on an adjusted offense level of 18 and a Criminal History Category of I. His adjusted offense level was derived from a base offense level of 20 with 2 points subtracted under Guideline § 3E1.1(a) for acceptance of responsibility. Holliday's Guideline range was derived from an adjusted offense level of 20 and a Criminal History Category of I. Her adjusted offense level was derived from a base offense level of 20 with 2 points added under Guideline § 3B1.3 for abuse of trust and 2 points subtracted for acceptance of responsibility.

[5] If only the pure quantity of Dilaudid and Diazepam had been considered, petitioners' base offense level would have been 12 because the drugs would be the equivalent of less than 5 grams of heroin. For Holliday, the resulting Guideline range would have been 10 to 16 months' imprisonment; for Stone the Guideline range would have been six to 12 months' imprisonment.

in calculating the Guidelines sentences for the pharmaceutical drugs involved here. The district court pointed out that the Sentencing Commission was aware of the differences between pharmaceutical drugs and other drugs when it promulgated the Guidelines, and the Guidelines explicitly require consideration of the gross weight for all drugs. C.A. App. 60-69, 90.

3. The court of appeals affirmed in an unpublished per curiam opinion. Pet. App. A1-A5. Petitioners argued that the Guidelines' reliance on gross weight in setting base offense levels was inconsistent with the Controlled Substances Act, as amended in 1986 by the Anti-Drug Abuse Act. The court of appeals rejected that argument. Relying on *United States* v. *Daly*, 883 F.2d 313 (4th Cir. 1989), cert. denied, 110 S. Ct. 2622 (1990), the court held that the calculation of the base offense level for drugs under Sentencing Guideline § 2D1.1 according to the combined weight of the narcotics and any carrier medium was consistent with 21 U.S.C. 841. Pet. App. A3-A4.[6]

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[6] The court of appeals also rejected petitioners' claims that the Sentencing Guidelines violated the Due Process Clause of the Fifth Amendment; that a downward departure from the Guideline range was mandated because of the relatively low purity of the drugs; and that the sentence violated petitioner Stone's plea agreement. Pet. App. A4-A5. Petitioners do not pursue those claims here.

ARGUMENT

Petitioners renew their contention (Pet. 5-12) that the Sentencing Guidelines are inconsistent with the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207, in calculating the Guideline range for Dilaudid and Diazepam according to the gross weight of the tablets rather than according to the net weight of the active ingredients in the tablets. Petitioners point to no conflict in the courts of appeals with respect to this issue, and they candidly acknowledge (Pet. 12) that "relatively few" cases present it. Moreover, the court of appeals was correct in concluding that the Sentencing Guidelines validly require consideration of the gross weight of the drugs seized in computing the base offense level.

As petitioners recognize (Pet. 9-10), the courts of appeals have consistently rejected claims that a sentence must be based upon the net weight of pure controlled substance rather than on the weight of the pure controlled substance plus the compound or carrier within which it is contained. See *United States* v. *Touby*, 909 F.2d 759 (3d Cir. 1990) (4-methylaminorex ("Euphoria")); *United States* v. *Marshall*, 908 F.2d 1312 (7th Cir. 1990) (en banc) (LSD); *United States* v. *Meitinger*, 901 F.2d 27 (4th Cir. 1990) (Dilaudid), petition for cert. pending, No. 90-5116; *United States* v. *Mueller*, 902 F.2d 336, 345 (5th Cir. 1990) (methamphetamine); *United States* v. *Skelton*, 901 F.2d 1204 (4th Cir. 1990) (PCP); *United States* v. *Elrod*, 898 F.2d 60 (6th Cir. 1990) (LSD), petition for cert. pending, No. 89-7689; *United States* v. *Bayerle*, 898 F.2d 28 (4th Cir. 1990) (Dilaudid); *United States* v. *Bishop*, 894 F.2d 981, 985-987 (8th Cir. 1990) (LSD), petition for cert. pending, No. 89-7708; *United States* v. *Daly*, 883 F.2d at 316-318

(LSD); *United States* v. *Taylor*, 868 F.2d 125, 127-128 (5th Cir. 1989) (LSD); *United States* v. *McGeehan*, 824 F.2d 677 (8th Cir. 1987) (LSD), cert. denied, 484 U.S. 1061 (1988). Cf. *United States* v. *Murphy*, 899 F.2d 714 (8th Cir. 1990) (purity of drugs not a factor in determining sentence); *United States* v. *Butler*, 895 F.2d 1016 (5th Cir. 1989) (statute and Guidelines required sentence based on total weight of 38 1/2 pound mixture that contained only small amount of methamphetamine); *United States* v. *Baker*, 883 F.2d 13 (5th Cir.) (same), cert. denied, 110 S. Ct. 517 (1989); *United States* v. *Whitehead*, 849 F.2d 849 (4th Cir.) (purity of drug not a factor), cert. denied, 488 U.S. 983 (1988). Petitioners nevertheless contend although consideration of gross weight is required for the drug offenses specifically enumerated in 21 U.S.C. 841(b)(1)(A) and (b)(1)(B), a different result is required for other drug offenses punishable under 21 U.S.C. 841 (b)(1)(C) and 21 U.S.C. 841(b)(2). That contention does not withstand analysis.

In enacting the Anti-Drug Abuse Act of 1986, Congress provided a range of escalating minimum penalties for persons who commit offenses involving increased weights of any "mixture or substance containing a detectable amount" of enumerated Schedule I and II controlled substances. 21 U.S.C. 841(b)(1)(A) and (b)(1)(B). That formulation plainly requires consideration of the gross weight of material containing a controlled substance, not the net weight of the controlled substance itself. In so providing, Congress expressly changed the prior law, which imposed penalties based only on the type of drug involved, rather than on its weight. 21 U.S.C.

841(b) (Supp. III 1985).[7] In addition to providing minimum penalties for offenses involving certain quantities of drugs, Congress also provided a catchall penalty provision for offenses involving lesser quantities of Schedule I and II controlled substances. 21 U.S.C. 841(b)(1)(C). This provision does not specifically describe the method for calculating the weight of the controlled substances for purposes of sentencing. Similarly, the penalty provision for offenses involving Schedule IV controlled substances does not specifically describe a method for calculating the weight of the controlled substances. 21 U.S.C. 841(b)(2).

In implementing the requirements of the Anti-Drug Abuse Act, the Sentencing Commission's Drug Quantity Table adopts the formulation that Congress set

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[7] The House Judiciary Committee explained the rationale for Congress's decision to change the method by which most controlled substances were considered for sentencing purposes, from the pure weight of the controlled substance to the total weight of any "mixture or substance" containing a detectable amount of a proscribed drug:

> After consulting with a number of DEA agents and prosecutors about the distribution patterns for these various drugs, the Committee selected quantities of drugs which if possessed by an individual would likely be indicative of operating at such a high level. The Committee's statement of quantities is of mixtures, compounds or preparations that contain a detectable amount of the drug—these are not necessarily quantities of pure substance. One result of this market-oriented approach is that the Committee has not generally related these quantities to the number of doses of the drug that might be present in a given sample. The quantity is based on the minimum quantity that might be controlled or directed by a trafficker in a high place in the processing and distribution chain.

H.R. Rep. No. 845, 99th Cong., 2d Sess. Pt. I, at 11-12 (1986).

forth in the Act itself: the entire weight of a "mixture or substance containing a detectable amount" is considered. Thus, the Guidelines provide that "[t]he scale amounts for all controlled substances refer to the total weight of the controlled substance. Consistent with the provisions of the Anti-Drug Abuse Act, if any mixture of a compound contains any detectable amount of a controlled substance, the entire amount of the mixture or compound shall be considered in measuring the quantity." Guidelines § 2D1.1(a)(3) Drug Quantity Table at 2.39 n.*.[8] See also *id.* at 2.41 Application Note 10 ("The Commission has used the sentences provided in, and the equivalences derived from, the statute (21 U.S.C. § 841(b)(1)), as the primary basis for the guideline sentences.").[9]

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[8] The reference in the footnote to a "mixture *of* a compound" appears to be a typographical error in view of the Commission's use of the phrase "mixture *or* compound" in the following clause and next sentence of the footnote (emphasis added). This is especially true since the Anti-Drug Abuse Act, on which the Guidelines provision is modeled, is framed in the disjunctive.

[9] The recent clarifying amendments to the Guidelines are to the same effect. The footnote now accompanying § 2D1.1's Drug Quantity Table at 2.45 (1990), states:

> Unless otherwise specified, the weight of a controlled substance set forth in the table refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance. If a mixture or substance contains more than one controlled substance, the weight of the entire mixture or substance is assigned to the controlled substance that results in the greater offense level. In the case of a mixture or substance containing PCP or methamphetamine, use the offense level determined by the entire weight of the mixture or substance or the offense level determined by the weight of the pure PCP or methamphetamine, whichever is greater.

Petitioners' challenge to the Sentencing Commission's approach draws no support from the text of the Anti-Drug Abuse Act; rather, that Act is fully consistent with the Commission's formulation. Nowhere does the Act require a different method of computing quantities for offenses under subsections (b)(1)(C) and (b)(2) than for other drug offenses. Moreover, the Act's structure supports, if not requires, the Commission's approach of applying a consistent standard to determining the quantities of a drug involved in an offense, and in graduating penalties accordingly.

Dilaudid is a Schedule II narcotic drug whose distribution is punishable under 21 U.S.C. 841 (b)(1)(C). Subsection (b)(1)(C) is not limited in its reach to the illegal manufacture, possession, or distribution of pharmaceutical products such as Dilaudid. Rather, that provision covers all Schedule I or II controlled substance offenses except as provided in Sections 841(b)(1)(A), 841(b)(1)(B), or 841(b)(1)(D). Consequently, the same controlled substances that are punishable by mandatory minimum sentences under subsections (b)(1)(A) and (b)(1)(B) are also punishable under subsection (b)(1)(C) when lesser quantities of total mixtures are involved. It follows, of course, that the "total mixture" approach for drugs such as heroin, cocaine, PCP, and LSD must be applied under subsection (b)(1)(C). Since Congress contemplated that sentences under subsection (b)(1)(C) for at least some drugs would be based on the total-mixture approach, the Commission was fully justified in applying that approach to all drug offenses punishable under subsection (b)(1)(C). There is no support in the statute or legislative history for applying two different methods for calculat-

ing the quantity of drugs involved under the same statutory provision.[10]

Similarly, there is no support for the view that Congress intended to preclude the Sentencing Commission's "total mixture" approach for drug offenses involving Diazepam. Diazepam is a Schedule IV drug whose distribution is punishable under 21 U.S.C. 841(b)(2). That provision states only that it applies to Schedule IV substances. Because Congress did not declare minimum sentences based on quantities of Schedule IV substances, the provision does not contain a formula for determining quantities of illegal substances. In view of Congress's failure specifically to address that issue, the Sentencing Commission reasonably applied the "total mixture" approach that was expressly set forth in other provisions of the Anti-Drug Abuse Act.

Not only does the Sentencing Commission's approach accord with the statute, it also provides an eminently sensible approach to calculating appropriate sentences according to the relative seriousness of the offense. Petitioners are therefore incorrect in asserting (Pet. 12) that the Commission has failed to determine sentences that comport with the purposes

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[10] Petitioners recognize that *United States* v. *Gurgiolo*, 894 F.2d 56, 61 (3d Cir. 1990), held that the "total weight" approach applies under Section 841(b)(1)(C), but err in contending (Pet. 10-11) that the court's conclusion resulted from a misquotation of the statute. The court simply recognized that Sections 841(b)(1)(A) and 841(b)(1)(B) require consideration of the total amount of a mixture or substance containing a detectable quantity of cocaine, and that the same approach should apply with respect to cocaine offenses under Section 841(b)(1)(C). The court noted that "section 841 does not create a clear distinction between the method of weighing Schedule II substances and the method of weighing Schedule III and IV substances." *Gurgiolo*, 894 F.2d at 61.

of the Sentencing Reform Act. See 18 U.S.C. 3553(a). Providing for a base offense level according to the total weight of tablets containing Diazepam and Dilaudid is consistent with the way that carrier mediums and cutting agents for other controlled substances are treated. "Drugs are rarely taken in undiluted form"; instead, "[t]he active agent is combined with inactive ones." *United States* v. *Rose*, 881 F.2d 386, 388 (7th Cir. 1989). Dilaudid and Diazepam are no exceptions. Although it is true that the weight of the inert substance may exceed the weight of the pure drug, and that the same total weight may contain different amounts of pure drug, that observation applies equally to substances such as heroin, cocaine, and LSD. See *United States* v. *Marshall*, 908 F.2d at 1316. The drug offender himself determines whether to traffic in low dosage or high dosage tablets; a large number of low dosage tablets may simply indicate an intention to reach a larger number of relatively modest users. The Sentencing Commission could rationally conclude that the seriousness of any offense involving a controlled substance is best measured by a total mixture approach.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1990

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